



United States General Accounting Office
Washington, DC 20548

Matter of: TRW, Inc.--Costs

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DIGEST

Where General Accounting Office (GAO) attorney, in conducting outcome-prediction alternative dispute resolution, advised parties that protest issue related to agency's price evaluation would likely be sustained (which led agency to take corrective action that rendered the entire protest academic), but GAO attorney did not address other, separate issues involving the technical evaluation, GAO does not recommend reimbursement of costs associated with the technical evaluation issues.

DECISION

TRW, Inc. requests that our Office recommend that it be reimbursed the costs of filing and pursuing an initial and supplemental protest challenging the award of a contract to BTG, Inc. under request for proposals (RFP) No. DASC01-98-R-0005, issued by the Department of the Army, for linguist services. Because the agency has agreed to pay the costs associated with the supplemental protest, only the costs of the initial protest are at issue here.

We deny the request.

BACKGROUND

After learning of the award to BTG and receiving a debriefing, TRW protested various aspects of the technical evaluation of proposals, which allegedly undermined

the price/technical tradeoff.¹ TRW received an agency report in response to its protest, which disclosed the Army's price evaluation methodology to TRW for the first time. Three days later, TRW filed a supplemental protest claiming that, by using that methodology, the Army failed to consider price as a significant evaluation factor, contrary to the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. §§ 2305(a)(2)(A), 2305(a)(3)(A)(ii) (1994 & Supp. III 1997), and the RFP evaluation scheme. The Army defended its price evaluation in a supplemental agency report.

Because TRW's supplemental protest appeared to be clearly meritorious, our Office held what we refer to as an "outcome prediction" alternative dispute resolution (ADR) conference, in which our attorney told the parties that it was her view that the protest was likely to be sustained. At the conference, our attorney expressed her view that the agency had failed to reasonably calculate the prices of the competing proposals, because it applied no estimated quantities to offerors' proposed labor rates, which were simply added together as if each labor category would be used equally during contract performance. The parties were advised that similar price evaluations had been held improper by our Office. See Lockheed, IMS, B-248686, Sept. 15, 1992, 92-2 CPD ¶ 180; Professional Carpet Serv., B-220913, Feb. 13, 1986, 86-1 CPD ¶ 158. Technical evaluation issues were not discussed at the ADR conference because, unlike the price evaluation issue, these issues did not fit squarely within established precedent and because it was anticipated that corrective action taken with regard to the price evaluation issue would render the technical evaluation issues academic.

After the ADR conference, the Army offered to take corrective action. Because the proposed corrective action sparked objections from TRW and appeared to be unreasonable, our Office held a second ADR conference, after which the Army proposed corrective action acceptable to the parties. First, the Army proposed to determine each proposal's price by projecting offerors' proposed labor rates based on reasonable, internal quantity estimates reflecting its expected contract requirements; the Army did not offer to amend the solicitation and accept revised proposals unless it was unable to develop such reasonable, internal quantity estimates. Second, the Army proposed to perform a new price/technical tradeoff considering the results of the corrected price evaluation. Agency's Second Corrective Action Letter, June 16, 1999, at 1. Based on the proposed corrective action, we dismissed TRW's initial and supplemental protests as academic.

In dismissing TRW's initial protest as academic, our Office denied the Army's request to issue a separate decision resolving the technical evaluation issues before the agency performed a new price/technical tradeoff. Agency's First Corrective Action Letter, June 7, 1999, at 2-3. While we acknowledged the possibility that TRW might

¹The initial protest also challenged BTG's award eligibility on grounds of an alleged conflict of interest, but TRW withdrew this allegation in its comments responding to the initial agency report. Protester's Initial Comments at 2.

protest the same technical evaluation issues if the agency ultimately confirmed BTG's award, we stated that we would not resolve the technical evaluation issues prior to the agency's corrective action.² We expressed no opinion as to the merit of the technical evaluation issues, apart from encouraging the Army to correct any technical evaluation errors it identified while implementing its proposed corrective action.

REQUEST FOR COSTS AND RESPONSE

In its request for costs, TRW has asked our Office to recommend that the Army pay the costs associated with both its initial and its supplemental protests. In response, the Army has agreed to pay the costs associated with the supplemental protest, but argues that TRW should bear the costs associated with the initial protest. The Army contends that the two protests are severable, that the clearly meritorious issue appears only in the supplemental protest, and that the agency's proposed corrective action pertains only to the improper price evaluation challenged in the supplemental protest.

ANALYSIS

As a general rule, we recommend that a prevailing protester be reimbursed the costs incurred with respect to all issues pursued, not merely those upon which it prevails. Omni Analysis; Department of the Navy--Recon., B-233372.2, B-233372.3, July 24, 1989, 89-2 CPD ¶ 73 at 3-4. However, our Office will limit its recommendation regarding a successful protester's recovery of protest costs when a part of the costs is allocable to a losing protest issue that is so clearly severable as to constitute a separate protest. Price Waterhouse--Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 3-4.

In our view, the protests here are clearly severable. In its supplemental protest, TRW challenged the agency's price evaluation vis-à-vis the RFP price evaluation scheme, CICA's price evaluation requirements, and precedent from our Office analyzing price evaluation methodologies. TRW's initial protest of the technical evaluation shared none of the facts or legal theories forming the basis for the supplemental protest, but

²We recognize that this case highlights a characteristic of our outcome-prediction ADR: in predicting the outcome of the case, our attorney may be able to address an issue where the outcome appears very clear (such as the price evaluation challenge here), but will not be able to express an opinion on an issue that is a closer call. Faced with that limited prediction, the party who learns it will probably lose the protest may elect to take action (withdrawing the protest, in the case of a predicted denial of the protest, or taking corrective action, in the case of a predicted sustain, as here) or it may decline to do so, in order to obtain a written decision (which, in this case, would presumably have addressed both price evaluation and technical evaluation issues).

was essentially based upon the agency's interpretation and scoring of offerors' technical proposals vis-à-vis the RFP technical evaluation scheme.

TRW argues that its initial and supplemental protests are intertwined because our Office declined to issue a separate decision on the technical evaluation issues after the Army offered to take corrective action with respect to the price evaluation issue. We disagree. The only feature common to the initial and supplemental protests was that they both challenged the award to BTG. This feature, while insufficient to intertwine the protests for purposes of recovering protest costs, see id., rendered both protests academic in light of the agency's proposed corrective action.

Specifically, any protest concerning the technical evaluation was, and remains, academic unless the agency decides that the award should go to BTG and the same technical evaluation issues remain and have a prejudicial effect on TRW. If that occurs, it is possible that TRW will protest the same technical evaluation issues raised in its initial protest. As noted above, the agency has not committed to amend the solicitation, accept revised proposals, or reevaluate technical proposals, but only to reevaluate price and to incorporate the new price evaluation results into a new price/technical tradeoff. If the agency confirms BTG's award without revising the underlying technical evaluation, TRW might again protest the same technical evaluation issues--and, if successful, might again request protest costs. Such a prospect underscores the divisibility of TRW's initial protest from its supplemental protest in this case.

For these reasons, we do not recommend that the agency reimburse TRW for costs incurred in filing and pursuing its initial protest.

The request is denied.

Comptroller General
of the United States